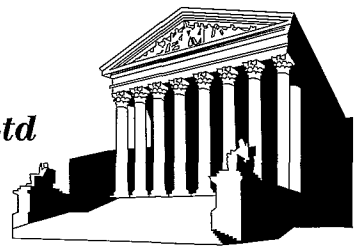
Mistake and Rerating:

Alstom Combined Cycles Ltd vs Henry Boot Construction Ltd



A recent case (4 April, 2000) to look at the question of valuation under civil engineering conditions in the presence of a mistake has been heard in the Court of Appeal in England. The case is noteworthy because it sets out how the court will balance the often separate issues of mistake and rerating. It could have implications in determining the effect to be given to mistakes in tender documents under other conditions of contract as well. *Professor Arthur McInnis* provides some insights.

Background

The parties were constructing a new power station for PowerGen Plc in Wales. Alstom Combined Cycles Ltd (Alstom) was the employer and Henry Boot Construction Ltd (Boot) was one of the contractors. When Alstom originally went to tender, it had shown cold water pipework on the drawings and specifications as being 4.4m above datum or the reference point for levelling. Subsequently, the pipework was lowered to 3.35m above datum. The effect of this change was to necessitate an alteration in the temporary works for installation of the pipework, additional work and new sheet piling. The parties agreed a small sum of £250,880 (US$379,833), and the work went ahead.

However, it turned out that there was a mistake by Boot in the sum quoted and that the mistake only applied to a portion of the work. Breaking down the sum to arrive at a cost per square metre (and there was also an issue that was brought up on whether this could be done or not, given a general lack of details) and then applying it to all of the works produced a total sum now close to £2.5 million. A dispute arose from this difference in value so the dispute was referred to arbitration, with John Tackaberry QC sitting as the arbitrator.

John Tackaberry QC as Arbitrator

Counsel argued over the meaning of numerous clauses in the conditions and Tackaberry had to decide what effect, if any, was to be given to the mistake. Alstom argued that the small sum should not be used as a price, and extrapolated to the increase in quantities or work as to do so would "compound" the mistake and result in a windfall gain for Henry Boot. Relying upon clause 52(1) of the ICE Conditions, Tackaberry agreed with Alstom and held, first of all, that he had no power to correct the mistake; and secondly, it would not be reasonable to use the small sum as it contained the mistake. Thus, he used a *fair valuation* to decide the sum owing. Boot, unhappy with this outcome and in which it saw its claim reduced by almost £2 million, appealed.

The Construction and Technology Court

The first appeal was heard by Judge Humphrey Lloyd QC. Boot sought to argue the arbitrator was bound to use the small sum as the rate or price for valuing the work. Judge Lloyd began with the general proposition that the contract rates and prices were sacrosanct and it was these that would be applied, mistake or not, to come to a decision. In his view, the rates and prices would only be changed if they were rendered unreasonable by reason of the change in quantities. Judge Lloyd concluded that this was not the case and referred the issue back to Tackaberry for reconsideration with this view in mind. Before the rehearing resumed though, Alstom took one final appeal, presumably because it believed using the small sum price would overcompensate Boot.

Key Court of Appeal Key Holdings

Two of the three Justices of Appeal who heard the case ruled as follows:

Lord Lloyd:

> *"... where the scale or nature of the variation makes it unreasonable to use the contract rates ... [it] certainly does not justify displacing the rates themselves because they were inserted by mistake or are too high or too low or otherwise unreasonable."*

> *"If the engineer were free to open up the rates at the request of one party or the other because they were inserted in the Bill of Quantities by mistake, it would not only unsettle the basis of competitive tendering, but also create the sort of uncertainty in the administration of building contracts which should be avoided at all costs."*

Lord Justice Ward:

> *"Once a rate is identified, then it is mandatory to apply it to calculate the value of the varied work.*

Any mistake in the rate is irrelevant because the arbitrator has no discretion to disapply it."

"[R]ates can be altered, not because they are inherently unreasonable, but because the scale of the valuation makes it unreasonable to use them ... reasonableness is determined by, and is solely dependent upon, whether the varied work is reasonably sufficiently similar to the contract work to justify the use of the contract rates."

"I fully accept that it may be held by the arbitrator to be reasonable to use mistaken figures as the basis for the valuation even if the consequence is that the resultant valuation is different from a fair valuation."

Summing Up

The court was clearly of the view that mistakes in tender documents stand despite the fact that they may still have to be used to later value additional work or changed quantities. Rates and prices once agreed will usually only be revised in clear cases where their use becomes unreasonable. The fact that the rates and prices may have been unreasonable in the first place, for instance, and even if they had been arrived at in error, it will not necessarily be a good ground for ruling out their use. ■AAC

Joint Contracts Committee News

The Joint Contracts Committee (JCC) now has a Fourth Draft out of the new agreement and Schedule of General Conditions of Building Contract for use in Hong Kong. Denis Levett, chairman of the JCC has been working steadily with Peter Berry, on behalf of the HKCA, and Professor Art McInnis, a consultant with DWS, to finalise the wording for committee approval in the fall. The new conditions are intended to be more user friendly with simpler drafting and layout while still maintaining much of their familiarity.

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